

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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)  
STRATASYS INC., ) Case No. 13-CV-3228 (DWF/JJG)  
)  
Plaintiff, )  
)  
vs. ) St. Paul, Minnesota  
) April 18, 2014  
MICROBOARDS TECHNOLOGY, LLC ) 9:10 a.m.  
d/b/a AFINIA, )  
)  
Defendant. )  
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BEFORE **THE HONORABLE DONOVAN W. FRANK**

UNITED STATES DISTRICT COURT JUDGE

**PLAINTIFF'S MOTION TO DISMISS AND MOTION TO STRIKE**

APPEARANCES:

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**P R O C E E D I N G S**

**I N O P E N C O U R T**

THE COURT: You may be seated, thank you. My apologies for the late start. It was a security committee meeting for the District that I had up, and actually there is another little seminar going on downstairs in the jury assembly room. So, we will proceed shortly.

If we can start on my right, Counsels' left? Do you want to note your presence for the record and what capacity you appear?

MR. LIEBMAN: Good morning, Your Honor, Ken Liebman of Faegre Baker Daniels for the Plaintiff Stratasys. And with me is my partner Tim Grimsrud.

MR. GRIMSRUD: Good morning, Your Honor.

MR. LIEBMAN: And Laura Steinhäuser. And Mr. Grimsrud will be delivering the argument this morning.

THE COURT: All right.

MR. BURNS: Good morning, Your Honor, my name is Mark Burns from the Haugen Law Firm representing Microboards Technology. And with me is Bill Cass of Cantor Colburn.

MR. CASS: Good morning, Your Honor.

THE COURT: Good morning.

MR. BURNS: Mr. Cass will be presenting the argument.

THE COURT: All right. First I will represent to

1       you that I have had an opportunity to read the submissions  
2       by counsel. And to the extent it is relevant, one of my  
3       lawyer/law clerks has also done the same. And since each  
4       Federal Judge, as most Bar members know in our District has  
5       a very high patent load -- in fact just coming off a *Markman*  
6       hearing from this past week.

7               But, I will have -- I will just put a couple of  
8       issues out there for you each to comment on. Obviously, on  
9       the one hand we have the defense saying the patents in  
10      question, the two patents in question were fraudulently  
11      obtained. And we have the Plaintiff here with their  
12      motions, both on inequitable conduct, which is oftentimes --  
13      even since the Federal Circuit has spoken, it frankly is  
14      oftentimes, and rarely successfully pled and gotten before a  
15      jury, as well as the affirmative defense issue.

16             But, one of the issues that I will be curious to  
17      hear about, in light of the fact that in February -- I will  
18      give you a specific date. There was the pretrial discovery  
19      conference on February 18th.

20             I would like to know from each party is: One, did  
21      you discuss with Jeanne Graham, yes, we'll be bringing this  
22      motion? Yes. For the Plaintiffs, I will be curious to say,  
23      yeah, we are letting everybody know we are coming on in on  
24      these motions for the affirmative defenses and the  
25      inequitable conduct. And if that was done, if the defense

1 then said, you know, we need some limited staged discovery  
2 on that issue, because that is what I have seen over the  
3 cases. And then I have had a couple of cases in the last  
4 couple of years where we came back in a couple of months and  
5 the plaintiff was able to convince me: Judge, it's like  
6 what we told you two months ago. Then I ordered all of the  
7 fees and all of the expense on the defendant saying: Motion  
8 is granted. Now, let's get on with the rest of the case.  
9 And defense is paying, because it is exactly as the  
10 plaintiff suggested.

11 So, I will be curious to find out if that happened  
12 with the Magistrate Judge, because one, obviously people  
13 knew the motion was coming in. The Plaintiffs did. And  
14 then two, obviously, the claim, with or without merit, the  
15 Defendant is making is a common one, and especially in the  
16 context of inequitable conduct. We need some limited  
17 discovery.

18 We certainly can't wait until next year when the  
19 discovery date is done next year in the middle of 2015.  
20 But, we claim they are hiding, concealing, and this motion  
21 is, therefore, premature. I would like to know if those  
22 discussions were had with the Magistrate Judge. And if they  
23 weren't, why not?

24 And assuming I rule on everything in front of me,  
25 in a perfect world, I would have a memorandum and opinion to

1       you within 30 days. It won't be longer than 60. It might  
2       be a little less than that. But, no complaints by me, it is  
3       a busy, busy time. Although, I feel like I got a semi-lease  
4       on life, because I was supposed to have been in my second  
5       Wells Fargo trial for seven weeks. On Saturday night, this  
6       past Saturday night, it settled. So, to my -- probably my  
7       biggest surprise in my 16 years here. But, we will save  
8       that for another day.

9               So, with that in mind, and I have read all of the  
10       pleadings, including the 42 -- I think it was 42-page answer  
11       by the defense, and counterclaim, so I am generally familiar  
12       with that. And "porosity," I tried to educate myself a bit  
13       on some of those issues.

14              So, with that in mind, we can proceed with  
15       Plaintiff's argument. Now, I don't know if counsel  
16       discussed it, I assume that absent either an objection or  
17       something else that has been discussed, I can just hear you  
18       out on the entire matter, rather than address one issue,  
19       then the other. If that is acceptable, I will just hear you  
20       out on both the affirmative defense issue and the  
21       inequitable conduct.

22              And I may, without intending to create mood  
23       lighting in the room, even though we all have monitors, and  
24       including for the folks in the gallery, two of whom are  
25       interns with my chambers, but I may dim the lights down on a

1       presetting just so anybody who wants to look at the screen,  
2       it is a little easier to see.

3               So, with that, we can proceed when counsel is  
4       ready. Excuse me. Whenever you are ready?

5               And it is always amazing to me, not unique to this  
6       type of case, but when counsel come in -- not necessarily  
7       local counsel -- local counsel that have national practices,  
8       as your firm does. The sad trend, even though that trend is  
9       by many fine jurists around the country, there is no one in  
10      our District doing it. But, how oral argument now, a  
11      majority of Federal Judges in this country, including our  
12      own circuit no longer have oral argument on dispositive  
13      motions of any kind, which is shocking to me for a lot of  
14      reasons. But, we won't solve that here today. There are  
15      probably some very good reasons. But, none of us here in  
16      this District do it, and it is not coming here anytime soon.  
17      So, whenever you are ready?

18              MR. GRIMSRUD: Thank you, Your Honor. We  
19      appreciate the time this morning.

20              THE COURT: And I am going to probably dial this  
21      down, now. I think you will still all have the lights on  
22      you, but so then when we do use this -- all right? Okay?

23              MR. GRIMSRUD: Thank you.

24              THE COURT: Can you see sufficiently there?

25              MR. GRIMSRUD: Yes, perfect. Thank you, Your

1 Honor.

2 THE COURT: All right.

3 MR. GRIMSRUD: I have two exhibits, if I may  
4 approach?

5 THE COURT: All right. You can bring those up.

6 MR. GRIMSRUD: Two copies of two exhibits, Your  
7 Honor.

8 THE COURT: Thank you.

9 MR. GRIMSRUD: Your Honor, the first exhibit just  
10 lays out, organizes the patents at issue in the two motions  
11 that we are talking about today. There are four patents in  
12 the case which Stratasys has asserted. Two of them are what  
13 the Defendant has brought the inequitable conduct motion  
14 on --

15 THE COURT: Right.

16 MR. GRIMSRUD: And then that is the 12(b)(6). And  
17 then for each of our four patents, they have a -- we have a  
18 Motion to Strike their Affirmative Defenses of Patent  
19 Misuse.

20 And Your Honor, as the Court noted, with  
21 inequitable conduct, I will start with the Inequitable  
22 Conduct 12(b)(6) Motion. And with inequitable conduct, the  
23 pleading standard is very high for inequitable conduct.

24 The Federal Circuit, the test for inequitable  
25 conduct is very high, also. You have to show "but for"

1 materiality, meaning if a reference was withheld, the patent  
2 would not have issued but for a reference being withheld.

3 And then, also, a specific intent to deceive the  
4 Patent Office by a specific person. And the Federal Circuit  
5 sets forth a very high standard under Rule 9(b) for pleading  
6 inequitable conduct, where the Defendant has to allege facts  
7 that plausibly show the "but for" materiality, meaning the  
8 who, what, when, where, how of all this alleged reference  
9 resulting in invalidity is being withheld.

10 And then also, secondly, even if materiality is  
11 alleged, the specific individual facts that plausibly show  
12 that a specific individual knew of the information and  
13 withheld it with specific intent to deceive the Patent  
14 Office -- and you can't rely on conclusory allegations, it  
15 has to be factual allegations. So, what we have brought  
16 today is this Motion to Dismiss.

17 And to Your Honor's comment about, really, a case  
18 management issue, we did in our 26(f) report specifically  
19 agree that the Defendant could seek discovery, reasonable  
20 discovery of defenses relating to unenforceability, which  
21 would be inequitable conduct. Also, patent issues is an  
22 unenforceability --

23 THE COURT: But, I didn't see anything in there  
24 about let's do that within the next X number of months and  
25 end it on this date. Because one of the big concerns and



1        why the Federal Circuit stepped in as they did, I am quite  
2        certain, when they did and how they did it in the patent  
3        cases I have seen over the years, I have seen those  
4        concerns, is -- well, we will have this for lack of a legal  
5        phrase, "fishing expedition" and it defeats the whole  
6        purpose if there is not staged or limited discovery, because  
7        there is going to be all of this work done.

8                And so, usually, it is more common to see, well,  
9        with or without agreement somebody pushes -- in our District  
10       it typically is the Magistrate Judge, to say: Well, let's  
11       have then a very limited in scope period of discovery, so it  
12       is done at a certain time. So, it's either the motions are  
13       either granted or denied, rather than, well, the sky is the  
14       limit, we will see you -- there is just one discovery date  
15       limit, as opposed to a staged -- whether that magical period  
16       is 60 days, 90 days, say on an issue like this.

17               And I am referring more now to the inequitable  
18       conduct, because in the affirmative defense issue, unless  
19       there is an allegation which sometimes is made at the case  
20       management or in the 26(f) report, if one or more of these  
21       are alleged irrespective of how they are pled, here is how  
22       it will change the scope of discovery. Then, in that case,  
23       and sometimes there is again staged discovery to say, with  
24       these affirmative defenses in, here is how we claim  
25       discovery is going to be so much broader or with the amount,

1 or sometimes there is no difference. And then the first  
2 time the Judge encounters it is at *in Limine* motions or a  
3 summary judgment motion. And out some of them go, if they  
4 are going to go, unless the discovery issue is raised early  
5 on saying: Here is what is going to happen if these don't  
6 go early. So, that is kind of what I was asking about.

7 MR. GRIMSRUD: Uh-huh. There was no discussion,  
8 Your Honor, about phased discovery or anything like that.  
9 There was discussions about basically what I have said,  
10 about if you do intend to amend the pleadings to, you know,  
11 add a claim, you'll need to seek discovery and then  
12 diligently amend the pleadings. But, no discussion -- just  
13 kind of the standard rules for that.

14 THE COURT: All right.

15 MR. GRIMSRUD: But there was no discussion about  
16 phased discovery.

17 THE COURT: Okay.

18 MR. GRIMSRUD: But, Your Honor, we are seeking to  
19 dismiss their inequitable conduct claims, but we recognize  
20 that they made a reference to us trying to block their  
21 discovery. That is not what we are trying to do in the  
22 case.

23 We recognize that they are entitled to seek  
24 reasonable discovery, and then, if appropriate, amend. We  
25 don't think there is an inequitable conduct claim in this

1 case, but to the extent they discovered something that they  
2 thought was worthy of amending their pleadings, then they  
3 could seek leave to do so.

4 THE COURT: And of course, I don't mean to  
5 interrupt your argument, but of course you know what they  
6 are saying, apart from the concealment issue. They are  
7 saying, hence -- and I will raise one issue, perhaps, and if  
8 it is in here -- and it typically is, especially -- not so  
9 much in a patent case, but in this setting -- but oftentimes  
10 it is. Even before *Iqbal* and *Twombly*, it was an issue with:  
11 Well, if you are going to dismiss that claim, is it with or  
12 without prejudice to renew it at some later date?

13 But, setting that aside, obviously you know they  
14 have used their words in their opposition brief that is not  
15 uncommon to say, well, we are claiming it is premature for  
16 you to be hearing this because -- well, and then as you  
17 said, that is because they don't want us to see any  
18 discovery, because they know what it is going to show. That  
19 is really what they are claiming, implicitly, explicitly.

20 So, but what you are suggesting is that: Well,  
21 they don't have enough. It hasn't been pled. And this is a  
22 Rule 12 setting. So, it should go by the wayside. And then  
23 the issue will be then, of course, is with or without  
24 prejudice -- I am talking now about the inequitable conduct.

25 MR. GRIMSRUD: Yes. Right, Your Honor, and the

1 Federal Circuit has set up this structure to -- they have  
2 been very explicit about the gatekeeping rule, not wanting  
3 inequitable conduct coming right out of the gate in these  
4 patent cases. You need to have the facts. You need to have  
5 the specific basis for alleging inequitable conduct.

6 And we did tell the Defendants that when they  
7 first answered and asserted inequitable conduct, and we had  
8 a meet and confer. They sought to amend the pleadings. We  
9 agreed to allow them to. And then we are back in the same  
10 place. And the reason is because they really don't have any  
11 basis to be asserting inequitable conduct.

12 And I will put an example up on the screen, Your  
13 Honor. This is from their Count 9 on inequitable conduct  
14 with respect to the '925 Patent. And it really --  
15 paragraphs 52 through 54 is kind of where it boils down.  
16 And says, "The inventor of the '925 Patent was aware of the  
17 '329 Patent and intentionally withheld it from the Patent  
18 Office."

19 There's all sorts of problems with this  
20 allegation. First of all, it fails as a matter of law  
21 because they don't actually allege intent to deceive the  
22 Patent Office. And there is certainly no facts in there  
23 about intent to deceive the Patent Office.

24 And with respect to the inventor being aware of  
25 the '329 Patent and intentionally withholding it, they

1 simply have no basis for these allegations. That is a  
2 conclusory allegation. It is right in the wheelhouse of  
3 what *Exergen* says from the Federal Circuit about, you can't  
4 just aver the substantive elements, you need to allege facts  
5 that could reasonably support the allegation.

6 And the reason they don't -- again, we don't  
7 believe there is any inequitable conduct in the case, but  
8 they certainly have no basis for making these types of  
9 allegations. They don't know anything about what the  
10 inventor knew or didn't know, or did or didn't do. There  
11 has been no depositions. There is just no facts that they  
12 are aware of to support their claims, which is exactly what  
13 the Federal Circuit says is grounds for dismissing these  
14 claims --

15 THE COURT: If I may ask this, and I know there is  
16 an issue in the case where you are saying, well, there is a  
17 distinction between -- and that is not unique to patent  
18 cases between what is pled in the complaint or the answer or  
19 counterclaim and what is in the brief.

20 Well, looking at what the -- and to the extent it  
21 is relevant, I am looking at page 6 of their brief. It  
22 said -- in both instances they are talking about the '058,  
23 '925. "The applicants made overt misstatements concerning  
24 the prior art and withheld material information concerning a  
25 prior art patent and products from the PTO."

1           And then they go on to say, "This is our basis for  
2     the inequitable conduct and patent misuse." We will just go  
3     with inequitable conduct. So, what you are saying is:  
4     Well, classic conclusory statements, and of course on the  
5     specific intent issue you know what the Defendant has said,  
6     and it is oftentimes said, again not unique to patent cases,  
7     but where this concept of specific intent is: Well, one,  
8     you can't get in the minds of people; and two, the inference  
9     is jumping off the pleadings that they did it intentionally.  
10    And with what we have pled, there is more than a reasonable  
11    or plausible inference of specific intent.

12           So, obviously, that is where the two of you part  
13    company, because I will have to either say: Yes, it is  
14    conclusory; or no, it is not. But that is where the two of  
15    you part company.

16           And of course, there is a second tear, I suppose,  
17    and again I will be quiet here in a moment, but the second  
18    tier where you have talked about the specifics in  
19    materiality in terms of the claims and limitations,  
20    themselves. They have to go into the patent, whether it is  
21    the '329 and say here is specific -- or, as they have  
22    alleged, the patent that your client had, and specifically,  
23    the prior art.

24           And you are suggesting that they also haven't  
25    said: Well, it is just not enough to refer to the patent.

1 And I suspect the defense is going to get up and say: Well,  
2 that is why we gave you that two or three-page tutorial.  
3 Because we wanted to show you, well here if it is not plain  
4 what we are claiming, here it is. And by tutorial I am  
5 talking about their two or three pages in there, their  
6 responsive memorandum.

7 But, I will try to stop talking here, but  
8 obviously, those are kind of the issues that have been laid  
9 out in front of me. And they are common -- I would expect  
10 to see those in this inequitable conduct when that issue has  
11 been put in front of me at this stage of the case.

12 So, I guess I will let you kind of tell me what is  
13 most important for me to know today, and we will go from  
14 there.

15 MR. GRIMSRUD: Yeah, Your Honor, I will address  
16 those comments. I guess for the intent issue and what is  
17 conclusory and what is not conclusory, I think one way to  
18 view it is a spectrum. On the one hand, there is conclusory  
19 assertions. The other end of the spectrum is going to be  
20 something that is extremely specific, and in the middle  
21 there could be a gray area.

22 Here we are at the conclusory end of the spectrum,  
23 because as far as what the inventors knew or what the  
24 inventors did, this is pure conjecture on their part. They,  
25 for materiality, you are right that we have also explained

1 in our briefing how these references -- we don't believe  
2 they have alleged materiality. They haven't explained how  
3 they are not cumulative, how they would result in invalidity  
4 but for their omission from the Patent Office.

5 And on the '329 Patent, for example, that is at  
6 issue for the '925 Patent? The '925 Patent is about,  
7 generally about this predetermined porosity, is what it is  
8 called. The '329 Patent, you can read it -- the word  
9 porosity doesn't even appear in the '329 Patent. So, that  
10 is the kind of thing where you need factual explanations for  
11 why this isn't cumulative, why the Patent Office would not  
12 have allowed the claims in view of that reference.

13 But, the intent, there is just no allegations of a  
14 specific individual having known of specific material  
15 information, and then intentionally withholding it with an  
16 intent to deceive the Patent Office. There is just no  
17 allegations, whatsoever.

18 And really what their claim comes down to is they  
19 are saying -- I think what they will say is, well, these  
20 inventors knew of these references. In the case of the '058  
21 Patent, knew of this prior product, the 1650, because they  
22 were developed by Stratasys. This '329 Patent has a  
23 Stratasys person as the inventor.

24 But, that would be an end-run around pleading  
25 inequitable conduct. Because basically what they are



1 saying, then, is anytime a defendant can find prior art that  
2 is of the plaintiff's, if they can somehow say it is  
3 material -- which again we don't think they have -- but if  
4 they can allege it is material, then that satisfies the  
5 intent requirement, which would basically mean anytime the  
6 defendant finds prior art that is not disclosed by the  
7 plaintiff, that is the plaintiff's own stuff, that is enough  
8 to allege inequitable conduct, which we believe the Federal  
9 Circuit has said that is not the case.

10 There are actually cases saying things like even  
11 articles that are authored by an inventor are -- failure to  
12 disclose those does not establish intent to deceive, because  
13 you need to show specific intent to withhold the reference  
14 and to deceive the Patent Office.

15 Also, another problem with their pleading, which  
16 is really highlighted from their brief is how they don't  
17 focus on a specific person. They talk about the inventor  
18 shown in paragraph 53, there. They switch to Stratasys'  
19 failure in their brief. They talk about -- it appears they  
20 are talking about the prosecuting attorneys that are  
21 involved. So, they are all over the place on what happened,  
22 who did what, which is the kind of conclusory, unspecific,  
23 allegation of unethical conduct that should not be  
24 permitted.

25 THE COURT: Well, it seems to me you touched on

1       it. I don't want to oversimplify this argument. And I am  
2       trying to read my handwriting here in my notes. But, I  
3       think the reason they introduced the tutorial is they used  
4       the phrase, quote, "the very features" and then they go on  
5       to say something you said a minute ago. Well, Judge --  
6       these are my words, not theirs. They are saying: Look  
7       closely, Judge, if we take the phrase "adjusting the rate of  
8       dispensing to provide a predetermined porosity," they are  
9       saying, look carefully, because that was all disclosed, that  
10      was all in that prior art.

11             And if you understand that, Judge, you will  
12      understand why we claim they fraudulently obtained these  
13      patents. That is separate from the argument that you both  
14      touched on about: Well, they are trying to maintain a  
15      monopoly in this area of technology.

16             But, that is really kind of what they are saying.  
17      And you touched on the porosity piece a moment ago, but that  
18      is in effect -- and I guess we are at the stage now where --  
19      and then I'll -- I promised I would before stop interrupting  
20      your argument.

21             But, where -- obviously, I will have to either  
22      agree in whole or in part with you, or disagree. But then I  
23      think before you are done, whether it is now or in rebuttal,  
24      I think I would like to make sure I understand the -- at the  
25      end of the day saying: Well, because I suspect there is

1 going to be an issue -- well, let's just say as an example,  
2 I come your way on the inequitable conduct.

3 You suggested, well, they should have waited to  
4 amend, because discovery may show, if they are going to have  
5 it, they haven't shown it. Well, and I actually thought  
6 that maybe that is what you were trying to avoid is this:  
7 Well, we don't want to have this limitless discovery, so  
8 unless you shut it off now on inequitable conduct, because  
9 that is obviously something that a lot of judges have  
10 commented over the years, it opens up the floodgates.

11 I just want to make sure I understand, not just --  
12 obviously, you have kind of put clearly through the merits,  
13 but, procedurally, where you think this should be at the end  
14 of the day, too.

15 Because I think you suggested that, well, let's  
16 just say, for example, I granted the motions. To the extent  
17 they say it is premature, you assume they will be back. If  
18 the discovery -- as opposed to you saying, if there is a  
19 motion to compel saying: Look it, the Judge has already  
20 dismissed that claim. Why are we going into this, this, and  
21 this? Because that is sometimes an issue early on in the  
22 case, too. You either have a showing of inequitable conduct  
23 or you don't. And if you don't, then that should end the  
24 inquiry early on so it doesn't go on ad infinitum.

25 But, anyway, I will sit tight, here. And you may

1 be saying: I've already answered that question for you,  
2 Judge, well then you can move on if you wish.

3 MR. GRIMSRUD: Your Honor, as we acknowledged in  
4 the 26(f) report, we recognize that there can be reasonable  
5 discovery, but there is definitely a point in time where it  
6 would become too late to add inequitable conduct. Our  
7 position is, they would need to diligently seek leave to  
8 amend. And if they -- you know, if they don't do so, then  
9 they wouldn't be allowed, in our view, to have inequitable  
10 conduct --

11 THE COURT: And of course it is true, apart from  
12 this case and inequitable conduct, there is in every order a  
13 separate deadline to amend. And then sometimes that  
14 corresponds with some staged discovery. Oftentimes it is  
15 like this. There isn't that staged or limited discovery,  
16 but there is that deadline that kind of self imposes that  
17 for a -- to amend.

18 And obviously, I will rule on what is in front of  
19 me. I am not going to kick the can down the road, but I  
20 will rule on what is in front of me. And I will be curious,  
21 you know, how -- whether it comes from the plaintiff's side  
22 or defendant's side, not unique to patent cases where a  
23 lawyer alleges or a party alleges: Well, we claim this  
24 motion is premature and here is why. Of course, it is a  
25 little bit different if it is in a summary judgment setting,

1 of course, as you know. But, we will see how they handle  
2 that, because that was kind of what they suggested.

3 And then, of course, the issue is: Well, whether  
4 that is true or false, what is the remedy for that? And you  
5 have addressed that. So, I will cease interruption and let  
6 you tell me what is most important for me to know for your  
7 client. So --

8 MR. GRIMSRUD: No, thank you, Your Honor. And  
9 there is deadlines for amending. And as we said in our  
10 brief, to the extent they were going to amend, we believe  
11 they need to seek leave under the Rules, follow the  
12 procedure for amending, and all of that.

13 On the tutorial I want to touch on that, as well.  
14 None of this is in their pleading. So, they introduced  
15 quite a bit of documents in there -- and arguments in  
16 their --

17 THE COURT: And I acknowledge you raised that in  
18 your reply brief.

19 MR. GRIMSRUD: Yes. We raised that, yes. And  
20 that is also -- they have talked about additional facts that  
21 they would like to use if they did some day seek leave to  
22 amend, including -- but, including for the porosity patent,  
23 they actually say the FDM 1500 product. So, that is an  
24 example of them shifting around.

25 You know, now they are talking about a different

1 product, totally different than this '329 Patent they are  
2 talking about in their pleading. So, we think there is a  
3 real problem here of conclusory allegations, their shifting  
4 theories, they don't identify a specific person. They go  
5 back and forth between one inventor, both inventors. Is it  
6 Stratasys, as a whole? The company as a whole? Is it all  
7 the applicants, whoever that would include that were  
8 involved in filing the patent?

9 So, to sum it up on inequitable conduct, they  
10 don't allege the specifics for materiality. And they don't  
11 identify a specific person who knew of material information  
12 in a reference and then withheld that information from the  
13 Patent Office with an intent to deceive the Patent Office.  
14 They have no factual allegations to support that.

15 And really, their argument is to try to show  
16 intent. It appears to be that, well, these were Stratasys'  
17 products. This is a Stratasys patent, so therefore the  
18 inventor has intended to deceive the Patent Office. That is  
19 not a reasonable inference. That is just conclusory.

20 And again, it would be an end-around the pleading  
21 requirement by basically saying that anytime the plaintiff  
22 has prior art that wasn't disclosed, you can infer intent to  
23 deceive. And the Federal Circuit has rejected that type of  
24 argument.

25 THE COURT: And not to be -- for me, I'm not

1 saying for you, but for me, not to be repetitive, aren't  
2 they in effect saying -- and then it comes back to, separate  
3 from the premature and discovery issue, it comes back to,  
4 well, either it is conclusory or it is not. I was looking  
5 at some other notes I had.

6 In effect, what they are saying is because the  
7 features are so common -- and another one they mentioned is  
8 the altering the percentage of fill. They are saying  
9 because these features are so common, Judge, by not  
10 disclosing this prior art, they knew if they did, the show  
11 was over, that they would not receive their patent.

12 And what you are saying is, well, one, you are  
13 saying part of this is in the brief, not in the pleadings.  
14 And the other thing you are saying is no matter which place  
15 it is, it is conclusory assertions that doesn't fit the 9(b)  
16 and the Federal Circuit's test they put together that is  
17 essentially a 9(b) with some individualized holding with  
18 respect to patent cases; but, that is, in effect, I think,  
19 what you are saying?

20 MR. GRIMSRUD: Right, and that there are zero  
21 factual allegations about specific intent to deceive or  
22 withholding of any of this material. You know, setting  
23 aside whether or not -- you know, there are issues of  
24 whether or not inventors knew of things, and then also the  
25 relevant inquiry is did they know of what is allegedly

1 material? And then did they withhold it with a specific  
2 intent to deceive the Patent Office? And there is no  
3 factual allegations that go to any of that, of the intent  
4 elements.

5 THE COURT: Well, and it will be -- and again,  
6 this may be semi-repetitive of what I just said, but we will  
7 know for sure when the defense takes the podium. Because,  
8 not to oversimplify your position over theirs, but they seem  
9 to be suggesting, and hence -- and I have used that phrase  
10 before -- this mini-tutorial that: Well, it is so obvious  
11 if one takes a look at these two patents, that anybody  
12 skilled in the art would have known if we disclosed this  
13 prior art, these patents will not and can not be obtained.

14 I mean, that seems to be -- and I anticipate in  
15 part they are going to say: Well, our burden isn't that  
16 high to say that, well, unless it appears to the court that  
17 it's so obvious, these features and these limitations are so  
18 obvious that no one could possibly think otherwise, so hence  
19 the materiality and specific intent.

20 And you are saying, clearly, in your argument  
21 today and in your briefing, assuming I have not  
22 oversimplified their position or over-characterized it. You  
23 are saying: Simply not enough. Saying it so doesn't make  
24 it so is in part what you are saying.

25 MR. GRIMSRUD: Yeah, that is in part what I am



1 saying is that you have to have specific allegations that go  
2 to the intent element. And without them, you are out of  
3 luck.

4 Also, with the comments about it being so obvious,  
5 those allegations are not in the Complaint. And as I was  
6 saying before, the '329 Patent actually doesn't even talk  
7 about porosity. So, to say that it is so obvious to connect  
8 the two would be a pretty big leap. And it is certainly not  
9 in their pleadings. But, the '329 Patent doesn't talk about  
10 porosity.

11 And then to touch on the other patent, the '925  
12 Patent -- or sorry, the '058 Patent where the inequitable  
13 conduct claim there is directed to this prior device, the  
14 FDM 1650. And it is the same problems on the allegations of  
15 the intent to deceive. They don't have anything. They  
16 shift between inventors and Stratasys. They don't have any  
17 factual allegations that a specific person withheld that,  
18 knowing that it had allegedly material information in it,  
19 and then also with intent to deceive the Patent Office. So,  
20 their pleadings on Count 10 of the inequitable conduct fail  
21 for the same reasons.

22 But, then, also, the patent in that case, they  
23 talk about how -- they talk about how the prior FDM 1650  
24 device was able to heat up to 70 degrees.

25 THE COURT: Right.

1 MR. GRIMSRUD: Well, they don't explain how that  
2 ties into a claim limitation, for one, which is a big  
3 problem of materiality, which the Federal Circuit talks  
4 about how for materiality, you need to show things like  
5 facts going to the what, when, where, the how, so where  
6 exactly is this feature that was allegedly withheld in the  
7 claims?

8 And they don't identify any claims in the patent.  
9 They certainly don't identify claim limitations. And what  
10 they do talk about is how the specification of the patent  
11 talks about it being -- the temperature range being between  
12 70 and 90 degrees.

13 Well, what they are saying about this prior FDM  
14 1650 device is that it went up to 70 degrees. The  
15 specification talks about 70 to 90. So, 70 degrees isn't  
16 even within the 70 to 90 range. And the claims, actually --  
17 this is where it is important to look at the claims, because  
18 the claims of the patent talk about how the temperature has  
19 to be above the solidification temperature. So, if what  
20 they are saying is that the solidification temperature is 70  
21 degrees, the claims are saying it has to be above that.

22 So, this FDM 1650 device, they haven't even shown  
23 that is above 70 degrees. So, they haven't, they have not  
24 explained how it could possibly be material. And that's one  
25 example of the problems with not alleging the factual

1       allegations of what exactly is material, what claim are we  
2       talking about, what claim limitation is relevant, where  
3       exactly in the claim limitation is this information that was  
4       withheld?

5               They don't do any of that in their complaint, or  
6       in their counterclaim, which is why they also -- one of the  
7       reasons why they also fail to allege "but for" materiality.  
8       And as I said, on Count 10, they also don't allege any  
9       factual information to suggest that a specific person knew  
10      of this allegedly material feature and withheld it with a  
11      specific intent.

12             THE COURT: All right.

13             MR. GRIMSRUD: So, Your Honor, I will move on to  
14      the patent misuse claims briefly of the Defense'. I will  
15      put an example up on the elmo. Their allegations of patent  
16      misuse are -- we explain this in our brief, but they are  
17      essentially the same for all of their patent -- all four of  
18      their patent misuse defenses, is that they say it is the  
19      assertion of the patent against them that constitutes patent  
20      misuse. So, they say that Stratasys by asserting, in this  
21      case, the '925 Patent against any Afinia -- I think it is  
22      supposed to say, any Afinia product constitutes patent  
23      misuse.

24             And then I will give another example. This is the  
25      ninth affirmative defense for the '058 Patent. They have

1 the same allegations that in this case the assertion and  
2 continued assertion of the '058 Patent against any Afinia  
3 product constitutes patent misuse, then they go on to say  
4 the assertion of the '058 Patent again Afinia is an attempt  
5 by Plaintiff to achieve a monopoly in the market.

6 So, their patent misuse defenses are all based on  
7 this theory that Stratasys' assertion of the patents against  
8 them is patent misuse. And as we explained in our brief,  
9 Congress, the Federal Circuit is clear that asserting a  
10 patent against somebody is not patent misuse.

11 Section 271(d) of Title 35 says, asserting a  
12 patent is not misuse. Then the Federal Circuit elaborates  
13 on that and says: That is right, even wrongful assertion of  
14 your patent -- even if the Plaintiff, for example, is wrong  
15 on the issue of infringement, that is not patent misuse.  
16 Because the Plaintiff has the right to assert patents. So,  
17 that is not patent misuse. There's narrow exceptions that  
18 we have explained in our brief.

19 THE COURT: And you are saying that whether it is  
20 the fraud or the sham or the other exceptions  
21 inapplicable -- and the two of you part company there,  
22 but --

23 MR. GRIMSRUD: Well, we actually -- we explain  
24 how -- we do explain how their fraud exception does not  
25 apply.

1 THE COURT: Right.

2 MR. GRIMSRUD: They have not alleged that. Same  
3 with the sham exception. To show sham, you need to allege  
4 things like the litigation, as a whole, is objectively  
5 baseless.

6 And then in addition, that the lawsuit is being  
7 brought for no purpose other than an anti-competitive effect  
8 to harm your competitor. So, it is very high for the sham  
9 exception, as well. And we went into detail on that in our  
10 brief. And in their response brief, they ignored it all.  
11 They didn't say anything about 271(d), they didn't say  
12 anything about any of these Federal Circuit cases we cited.  
13 They didn't say they met the fraudulent exception. They  
14 didn't say they met the sham exception. They literally  
15 ignored our argument on that, which in our view means they  
16 have completely abandoned their patent misuse theory.  
17 Because the only theory they have is this theory of  
18 assertion of the patents, and that is it.

19 Instead, what they have done in their response  
20 brief is switch to this other theory based on licenses that  
21 Stratasys has with its customers, not Afinia. So, they are  
22 saying that the misuse somehow results from license  
23 agreements that Stratasys enters into with its customers.  
24 And we have explained in our brief how, one, that theory  
25 isn't pled. That is not a basis of the misuse.

1           They allude to the license in some paragraphs, but  
2           they don't say that the license is patent misuse. The only  
3           patent misuse theory was the assertion of the patent which  
4           is legally foreclosed by law, which is one of the, you know,  
5           key reasons for having Rule 12(f) for striking defenses when  
6           they are foreclosed by law. And they don't address it,  
7           which means they have abandoned it, in our view. So, that  
8           should be clearly out of the case.

9           And then they license -- so, the license theory is  
10          not pled. In addition, they don't have any case law  
11          supporting it, and the Federal Circuit is clear that patent  
12          misuse isn't this catchall defense that you can allege for  
13          any type of what you think is wrongful conduct. You need to  
14          be -- this is in the *Princo* case from the Federal Circuit.  
15          You need to be in very narrow areas where patent misuse is  
16          recognized. And they haven't -- they don't fall into any  
17          category that they have shown a case for that supports  
18          patent misuse.

19          In addition, their theory is very -- it is kind of  
20          speculative in the extreme, I guess you would say. Their  
21          theory is essentially that this license that Stratasys has  
22          with customers includes various -- a grant-back provision  
23          where Stratasys would get a non-exclusive license to use  
24          certain property of their customers to the extent the  
25          property is based on Stratasys' intellectual property. And

1 they are saying that means that Stratasys gets grant-backs  
2 for expired patents.

3 And there is no evidence at all that Stratasys or  
4 anyone has ever interpreted that license to include expired  
5 patents. You know, the reasonable reading would be, if it  
6 says patents, you are talking about patents in force, not  
7 expired patents.

8 So, there is no -- it is totally speculation. It  
9 is an unreasonable reading of this license agreement. It is  
10 not supported by law. We think this kind of theory, in  
11 addition to not being pled, is a waste of time and  
12 immaterial, because it is not a relevant issue. And so,  
13 that is the reason for striking it.

14 THE COURT: Again, not to oversimplify the  
15 position of either party, but the theme -- whether there is  
16 a changed theory or not, we will see how Defendant responds  
17 to that that you raised in your brief and today. But, a  
18 theme throughout this, and then the question is well just  
19 how far does it reach and how is it pled, is the fraudulent  
20 obtainment of the patents.

21 And I anticipate hearing about, well, there is,  
22 after all, this fraud exception. And of course, you have  
23 discussed that with respect to the inequitable conduct.  
24 But, that is kind of the theme that I think is through the  
25 answer and counterclaim of the defense. But, we will see if

1       that is a key issue here that is relevant to the affirmative  
2       defenses that have been pled.

3               MR. GRIMSRUD: And Your Honor, again, I will  
4       finish up here. But, the fraudulent obtaining exception for  
5       patent misuse, that is not addressed in -- you know,  
6       Defendants don't address that in the brief. In our view  
7       they have abandoned it and gone on to this different theory  
8       based on a license. So, in their brief, they don't argue  
9       about fraudulent obtaining the patent as an exception for  
10      patent misuse.

11             Also, another point is that with these affirmative  
12      defenses of patent misuse, they have only asserted  
13      inequitable conduct for two of the patents, so for two of  
14      the patents they haven't even tried to assert inequitable  
15      conduct, which you would think means there is no chance that  
16      there is fraudulent obtaining for the '124, or the '239  
17      Patents.

18             And to the extent inequitable conduct is  
19      dismissed, there couldn't possibly be a fraudulent obtaining  
20      exception for the '925 and '058 Patent. If they haven't  
21      pled inequitable conduct, there is no way they could plead  
22      fraudulent obtaining --

23             THE COURT: All right.

24             MR. GRIMSRUD: -- which actually some courts say  
25      would have a higher standard to allege fraudulent obtaining



1 the patents if there's actually fraud on the Patent Office.

2 But again, they haven't addressed any of this in  
3 their briefing with respect to their patent misuse defense  
4 that would be based on fraudulent obtaining. So, it will be  
5 interesting to see what they say, but in their briefing they  
6 did not address any of the possibilities of exceptions to  
7 271(d), so in our view, all of their patent misuse defenses  
8 should be stricken.

9 THE COURT: All right?

10 MR. GRIMSRUD: Thank you.

11 THE COURT: Thank you. And there will be time for  
12 rebuttal.

13 MR. CASS: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. CASS: It will take me a minute to set up.

16 THE COURT: You know, the last few weeks when  
17 people have been coming here, lawyers from around the  
18 country for different things, they are questioning the  
19 calendar. I don't mean the Court calendar, I mean the  
20 calendar that says it is supposed to be springtime in  
21 Minnesota.

22 MR. CASS: I have to laugh, Your Honor, because I  
23 actually live in Massachusetts and commute to Hartford and I  
24 live in a little farm town. And we had an inch and a half  
25 of snow a few days ago.

1 THE COURT: Oh, you did, did you?

2 MR. CASS: I sympathize. Hopefully I can do this  
3 correctly. Hey, how about that? I have previously given --

4 THE COURT: Yes, I have it.

5 MR. CASS: -- the presentation.

6 So, what I would like to begin with is, if the  
7 Court permits this, with the inequitable conduct and the  
8 *Exergen* standard which says -- it does tell us that you can  
9 make a reasonable inference from the facts that are before  
10 you. Because, after all, specific intent, unless you have a  
11 smoking gun, you are never going to get that in this case.

12 And there are three other cases that I cited in my  
13 brief that I think are extremely important for the Court to  
14 consider. And those three cases are the *Aventis Pharma*  
15 versus -- these are all post-*Therasense* cases.

16 The *Aventis* case is interesting because it is  
17 almost all on all fours with this case. It involved a  
18 situation where the inventors disclosed prior art discussing  
19 the problem to be solved, the problem they were trying to  
20 solve. But, they didn't disclose the art that was relevant  
21 to how you would solve the problem.

22 And also, the *W.L. Gore -v- Medtronic* case, that  
23 was a case with an intraluminal stent graft, and they made  
24 statements about the prior art, which were false. And I am  
25 going to explain in a minute why we have that here. And

1        then the *Cumberland Pharm.* case where, like here, you had  
2        prior use of their own product. You had failure to disclose  
3        the prior art, and failure to show what was being marketed.

4                So, kind of with that in mind, I want to just talk  
5        a minute about my little technology tutorial, because it is  
6        a kind of an interesting technology. It prints  
7        three-dimensional parts. And as Your Honor might know from  
8        our brief, when we talk about the -- there are two things.

9                One is, how dense are you laying down the goop,  
10       the plastic, right? And I call that road width, but it can  
11       also be the fill percentage. That is how we get into the  
12       whole porosity thing.

13               And the second thing is the temperature which  
14       basically the heating cabinet is maintained. What is the  
15       temperature at the heating cabinet? So, the first one, the  
16       porosity one is the '925 one that is talking about porosity;  
17       and the second one is the heating cabinet, which is the '058  
18       in terms of inequitable conduct. And I think we all  
19       understand the concept of road width.

20               So, the first thing I want to talk about is the  
21       '058 Patent. If you look at that patent, Your Honor --  
22       perhaps I can switch over to the elmo, too, if I am artful,  
23       but nearly every passage in that patent is about maintaining  
24       that heating cabinet between -- and it is not above 70, it  
25       is between approximately 70, to approximately 90. That is

1 the words that are cited in our counterclaim.

2 It is not above. He said in his argument papers  
3 that it was above. And as Your Honor may know from these  
4 cases, under the *Titanium Medical Products* case, if you are  
5 within a range -- if something is important within a range  
6 in patents, and you are anywhere in that range, that is an  
7 invalidating circumstance.

8 So, I wanted to correct that, because the phrase  
9 is approximately 70 to approximately 90. And before they  
10 applied for this patent and put all of these figures in this  
11 patent, and they were disclosing and representing to the  
12 Patent Office just like in these three cases I cited, they  
13 are making a representation to the Patent Office: We  
14 discovered something unique. If you maintain between 70 and  
15 90, each time you put a new layer on, it is going to meld  
16 together better, is what they are saying throughout the  
17 entire patent. And their own equipment did it.

18 And if you go back, if you look at the table --  
19 this is just an example of the figures. Every major figure  
20 in the patent talks about depositing it in this very  
21 specialized window. And their own prior art said maintain  
22 it at 70. So, it is within that window on every single  
23 figure. And that is really the crux of the -- oh, also,  
24 they represented ABS plastics were novel, too. But they  
25 were using ABS plastics years before.

1           And they made this representation, the prior art  
2           they cited, none of the prior art on the face of the '058  
3           Patent, if you look at the prior art that he made his  
4           statements about, none of them mentioned ABS plastics, and  
5           none of them mentioned this 70 degree temperature range,  
6           which is what the entire patent is about. Okay?

7           So, like *Aventis* and *W.L. Gore* and *Cumberland*  
8           *Pharm.*, you have overt misrepresentation on the part of the  
9           inventor about what the patent -- the problem to be solved  
10          is in the patent.

11          THE COURT: Now, what of their both today and in  
12          the briefing saying: Well, one place Defendant's say  
13          inventor, the next one they use the entity's name. Another  
14          one they -- what is most important for me to know about --  
15          you heard the arguments, I won't repeat it. And if you are  
16          going to comment on it later, I will just sit tight on the  
17          naming with particularity, or the specific individual or  
18          individuals.

19          MR. CASS: Well, it's funny, because it used to be  
20          you tried to be gentlemanly in your pleadings, now I see I  
21          should have been a little more aggressive. But, clearly,  
22          Mr. Crump -- and I pointed this out in my reply briefs. We  
23          have the evidence in spades. He is Chairman of the Board.  
24          He signs the press releases all about the 1650 and the 1600  
25          going out.

1           If the Court were to find that this, in and of  
2           itself isn't enough, because here you have an overt  
3           misrepresentation of their own product, of their own product  
4           to the Patent Office, okay? If the Court were to find that  
5           wasn't sufficient, we could easily plead what we would need  
6           to do to include Mr. Crump. And we can relate it to the  
7           claims, I think, under the nature of the prosecution of this  
8           case.

9           This was a case where there was just a first  
10          office action allowance. It just went poof. And it went  
11          poof because they withheld something that was right in the  
12          range of what they are claiming was novel with the specific  
13          ABS plastic. And if you look at the prior art patents I  
14          cited, that was one overt misstatement. And I did include  
15          the other one in my brief.

16          But, look what he says, look what they say about  
17          the prior art. They say, they identify the '329 Patent,  
18          that they didn't put of record in the other one. So, here  
19          is evidence that they knew about it, anyway. Because, that  
20          was his patent.

21          So, clearly, if you look at the '058 Patent, both  
22          Mr. Batchelder and Mr. Crump are inventors and he signed  
23          this declaration. I don't know if this one preceded the  
24          other, but clearly Mr. Crump knows about the patent.

25          These three patents have nothing to do with the

1 use of ABS plas -- patents, or with -- one is to  
2 stereolithography, Your Honor, and that is a technology  
3 where you have a vat of goop. And what happens is a layer  
4 is laid down and a laser comes by or a UV light heats part  
5 of it, and then they put another vat of goop. It has  
6 nothing to do with FDM.

7 And the other one doesn't disclose any kind of  
8 heating cabinet there. So, we have the whole overt  
9 misstatement in the patent, itself, saying we just invented  
10 70 to 90 degrees with ABS plastics, which wasn't true, and  
11 then they mischaracterize it in this misstatement that, you  
12 know, it is novel over all of this prior art.

13 And this is exactly on all four corners with  
14 *Aventis, W.L. Gore* and *Cumberland*. And this is what we  
15 allege in the pleadings with specificity. We say the  
16 statement that they made, we give the statement, and we give  
17 precisely the prior art that invalidates that statement.  
18 This is an overt misrepresentation.

19 And where you have a misrepresentation, that is  
20 enough to plead inequitable conduct.

21 THE COURT: Well, and then -- and you've --  
22 obviously, one of you has to be incorrect today, because  
23 obviously you have heard, consistent with their brief,  
24 Plaintiff's suggest: Look it, it isn't simply enough to  
25 say -- and I am sure you are going to touch on it. I have

1       used the word, well, it is so obvious, you don't have to  
2       break it down by limitation or this specific claim, but they  
3       are suggesting: Well, it is not enough what they have  
4       alleged. Saying it so doesn't make it so. But, did I  
5       oversimplify your argument when we were exchanging about the  
6       it's so obvious phrase?

7               MR. CASS: Yeah, it is so obvious, Your Honor,  
8       that there is no way that these inventors associated with  
9       this company -- this isn't this abstract concept of, oh,  
10      well, we had this parallel patent application in Germany.  
11      And oh, my goodness, there was a reference cited there. Oh,  
12      and you didn't cite it in your U.S. case. This is an overt  
13      statement to the Patent Office about the novelty of this  
14      entire patent.

15             Every single -- if you look at the -- and I won't  
16      switch to the elmo because -- I probably will -- well, let  
17      me just switch to the elmo for a second just to show you how  
18      obvious this is. Is that the camera, doc camera?

19             THE COURT: We can probably do that. Shall I do  
20      that here? Oh, you got it.

21             MR. CASS: I think so.

22             THE COURT: I think so.

23             MR. CASS: I am not always the sharpest bulb.

24             Every representation in this patent, Your Honor,  
25      is about this magic 70 to 90. And it is not above 70, as he



1 referenced. The words are actually approximately 70. That  
2 is a weasel word in patent law. And that is why the whole  
3 thing is replete with fraud. And so it went right through  
4 the Patent Office.

5 Yeah, sure it did, because they never told the  
6 Patent Office about the prior machine. And that is exactly  
7 the problem with these, the cases that I cited, and they are  
8 right on point, because it is the same thing where the  
9 inventors, themselves, it's their own prior art that they  
10 are working with, their own product that was on sale. They  
11 have a duty of candor. They have to tell the Patent Office  
12 what products are on sale. And what the attributes of those  
13 products are if they are trying to make, you know,  
14 distinguishing features to advance it. So, the whole, the  
15 whole patent is replete with misrepresentations. Every  
16 major figure they cull it out. So, let me just -- I want to  
17 talk about the fraud.

18 Now, in the answer and counterclaim, they are  
19 cherry-picking some of the statements that were made. We  
20 actually pled quite a bit about that porosity patent. We  
21 went through in great detail and we also alleged it was all  
22 of the claims, because all of the claims were going to rise  
23 or fall on their arguments over the prior art.

24 Let me get to 35. And it is on page 37 of our  
25 answer and counterclaim, Your Honor. So, what happens is --

1 I'm sorry, it is 38. He only cited part of the answer and  
2 counterclaim. See, during the prosecution, all claims, all  
3 claims -- we have identified all claims were rejected by the  
4 Examiner. And the Examiner made specific, you know,  
5 rejections over two pieces of prior art.

6 And he says the word porosity isn't mentioned  
7 anywhere in the patent? Paragraph 47 is their statement  
8 about porosity. And he completely ignored this this  
9 morning. And it says, "Neither CIMA I or CIMA II suggests  
10 the adjustment of the rate of dispensation of the material  
11 made to control the porosity of the article being formed."

12 They are the ones that interjected the word  
13 porosity. And the porosity word appears in the claims.  
14 This is the applicant for the patent, okay? And then we  
15 cite the prior art. And at paragraph 51, we give specific  
16 statements as to why adjusting the rate of dispensing to  
17 affect porosity was known. And it was known because of  
18 their own '329 Patent. Okay?

19 Where they talk about varying, using  
20 interchangeable orifices which changes -- it is kind of like  
21 plumbing. I am not a great plumber, but if you have a  
22 bigger hose, you can put down -- a fire hose puts down a lot  
23 more stuff than a garden hose.

24 And then they also talk about a variable-sized  
25 orifice, which also changes the dispensing. And then, after

1 we allege this, we came to learn that the very feature they  
2 are suing us on -- I just want to with switch back to the  
3 lectern PC. So, in other words, a lot of this has been  
4 cherry-picked in terms of the argument, but there is a lot  
5 of great detail in the answer and counterclaim.

6 Now, I find this really interesting. In the  
7 Complaint, Your Honor, they allege that because this company  
8 changes the fill settings -- this is exhibit -- this is  
9 paragraph 26 of their Complaint. They are saying that  
10 because the fill settings are changed, that is how Afinia  
11 infringes the patent, right?

12 Well, their own 1500 device in 1994, if you go  
13 down to road width, and this is a little bit harder to see,  
14 but you can see you can change the nozzle size, but you can  
15 also change the road width. It goes from .04 maximum, or  
16 .001, for example, under the .010 nozzle. Right?

17 THE COURT: Right, I have got it.

18 MR. CASS: So, they are able to change the road  
19 width, the very feature they are suing Afinia for within  
20 their 1994 machine. And also, and that makes sense because  
21 that patent I just showed you shows you can vary the tip  
22 diameter, and they didn't disclose it.

23 So, here is another situation where you have an  
24 overt misrepresentation by the Plaintiffs of the status of  
25 the prior art, and why the patent should be granted, when

1       their own technology, both the patent that wasn't disclosed  
2       and the 1500 machine that wasn't disclosed provided for  
3       adjusting the rate of dispensation.

4               And I have bolded it at the bottom, but this is  
5       alleged in our counterclaim, Your Honor, neither CIMA I nor  
6       CIMA II suggests that the adjustment of the rate of  
7       dispensation of material may be made to control the porosity  
8       of the article being formed. That is directly on point to  
9       the withheld evidence. The only reasonable inference from  
10      this -- and we are entitled to a reasonable inference, I  
11      believe, on this, and all facts are assumed to be true at  
12      this stage; is that this was done to procure the patent.

13             Now, we asked for phase discovery, and they  
14      rejected that. We wanted to do some phased discovery. We  
15      didn't have a discussion. But, I think that we have clearly  
16      met the burden that is required of us on equitable conduct  
17      for these two patents under those three cases I mentioned,  
18      *Aventis, W.L. Gore* and *Cumberland*.

19             So, now I want to talk a little bit about the  
20      patent misuse if Your Honor doesn't have any questions.

21             THE COURT: All right. And what -- I mean, it may  
22      not even be a fair question. What do you hope that the  
23      discovery would show? Obviously, in the brief you state  
24      that there's -- you use the phrase, this is premature  
25      because discovery will kind of reveal what we claim they are

1       concealing.

2               MR. CASS: Right. We also think that, you know,  
3       we're very lucky. We were able to get a 1994 and 1995  
4       version of their prior machine. I was in another one of  
5       these and it took us several years. People knew of it, we  
6       couldn't locate it, but we already have it.

7               There are some other things going on, Your Honor.  
8       One of the reasons why Your Honor is probably saying, well,  
9       why is Mr. Cass alleging all of this monopoly business in  
10      his claims? And it kind of ties in a little bit to the  
11      patent misuse, and this is how it does, Your Honor. The  
12      greater your market power -- and I have shown the Court some  
13      evidence. We have excellent evidence of market power  
14      against Stratasys.

15              The greater your market power, the more scrutiny  
16      the clawback provisions of a license are given. And that's,  
17      I believe, under the Department of Justice guidelines. So,  
18      the patent misuse, yes, we have absolute fraud in the '058  
19      and the '925 Patent, right? But, the licensing scheme, if  
20      you look at the license -- and they have got all of these  
21      licenses included, you know, under the terms of their  
22      license. They are requiring any customer to give them any  
23      improvement patent on any of their patents, regardless of  
24      what country they are in, wherever they buy a machine. So,  
25      they are expanding, first of all, the scope of their

1 intellectual property.

2 Because if you are in Istanbul and you bought a  
3 Stratasys machine and now, you know, you invent something,  
4 they don't have patents in Turkey, but they are going to  
5 require a clawback provision to obtain all of those rights.  
6 And that is another instance where I think to some extent  
7 the counterclaim is a little bit cherry-picked.

8 Yes, there's allegations about monopoly and market  
9 power and all of those other things, and I am entitled to  
10 have additional facts in my counterclaims, because I want  
11 them to admit or deny those. But, those also weave into the  
12 patent misuse theory. Because, again, the greater -- this  
13 is how GE got in trouble in the 1940's with patents because  
14 they had such a market on the incandescent light. So, the  
15 greater your market power -- it is a factor to show it  
16 violates the rule of reason, because of who you are and  
17 where you sit.

18 And what the patent misuse counts say is you can't  
19 impermissibly broaden the scope of your patent. And that  
20 can be by time, by jurisdiction, and by geography. Which,  
21 if you look at that license, I think it violates all three.

22 Now, it is an interesting defense, because if that  
23 defense is proper and lodged, and lodged correctly, and I  
24 submit that it is, because we've referenced the license, we  
25 made allegations about how it enhances the scope of their

1 patents. That defense prohibits them from getting any  
2 damages until they stopped that licensing program. So, it  
3 is a valid defense. And that is why these things still come  
4 up. And I will just cite some of the cases --

5 THE COURT: So, what of their observation -- they  
6 had it in their reply brief and a focus today about, well,  
7 the defense has changed their theories. One, it is not  
8 pled. Two, it is a different theory now than it was, so  
9 maybe, perhaps, they have abandoned the other.

10 What is most important for me to know now about  
11 that?

12 MR. CASS: I think what is most important for you  
13 to know is that under each count -- yes, I have additional  
14 facts I want them to admit or deny; and that is true. But,  
15 the operative facts for the count, I didn't allege monopoly,  
16 I haven't alleged monopoly, yet. I haven't alleged  
17 antitrust yet. Those are paragraphs in there, but that is  
18 not what is being alleged.

19 What is being alleged is patent misuse based on  
20 two theories. One is the inequitable conduct of the two  
21 patents at issue, and the other one is that the asserted  
22 patent is part of the license for part of the patent misuse.

23 And if you go to the cases that talk about patent  
24 misuse, like windsurfing, you know, when you try to tie the  
25 validity of a trademark with a patent, that is an example of

1 patent misuse. *Atlanta Pharma*, where you are treating the  
2 patent as if it is in force beyond the date of its  
3 expiration, that is another example.

4 If you violate a reasonable and nondiscriminatory  
5 license scheme where you are supposed to license out the  
6 technology, that is another example of patent misuse.

7 If you make a misrepresentation over a standard,  
8 you know, if you are in an industrial standard and you have  
9 misrepresented the scope of your patents as participating in  
10 that standard, that is another example of patent misuse.

11 So, patent misuse is still there. The question for the  
12 Court is -- and it is really a legal question because you  
13 have the provision in front of Your Honor. Your Honor can  
14 see the provision from the contract. It was attached to our  
15 defense as Exhibit A. Your Honor can look at that as a  
16 matter of law and see if our interpretation, I suppose, is  
17 legally plausible, and I believe it is. And we have alleged  
18 that in our counterclaim.

19 I think right after we alleged how much market  
20 power they have, we get into the license and how the license  
21 is invalidated. It is roughly on page -- it bridges pages,  
22 I will say, it bridges pages 9 through, roughly, Page 12 or  
23 13 -- yeah, Page 12. And then those counts, those  
24 paragraphs are incorporated in the other affirmative  
25 defenses.



1 But, what is being alleged is that the clawback  
2 provision isn't limited in time. It is a contract of  
3 adhesion. It purports to cover expired patents. It is not  
4 limited in geographic scope. It purports to cover patent  
5 rights for third parties; that it requires a customer of  
6 Stratasys to share their invention with 50 percent of the  
7 market, because that is their rough market power if you add  
8 up what the industrial studies say and their recent  
9 acquisitions.

10 So, from my point of view, that has been very,  
11 very well pled. There were specifics, but Your Honor can  
12 look at paragraph 8.2 and make the call as to whether that  
13 is legally plausible. And we said why it isn't. And that  
14 is a defense.

15 As long as -- if I am correct that that is an  
16 illegal provision and that they are using it and that they  
17 have market power and that it violates the rule of reason --  
18 because that is the test, on a clawback provision, is  
19 whether it violates the rule of reason, given their market  
20 power, then I have adequately pled it.

21 But, to kind of just sum up, here, because, you  
22 know, I tried to read all of the cases before today and I  
23 think I was up until 1:00 in the morning last night. And  
24 you read so many cases where a court allows it or a court  
25 doesn't allow it on inequitable conduct. And you start

1 scratching your head and say: Well, what is enough and what  
2 isn't enough? And really, I think those three cases, when  
3 you go back to -- this FDM machine didn't fall from Mars.  
4 This was known to them. This was their product. And the  
5 '058 Patent was all about this magic range. And they knew  
6 it.

7 And this is a difficult area of the law. It  
8 requires a lot of honesty and integrity both at the Patent  
9 Office -- especially at the Patent Office. And I think that  
10 those cases, *Aventis*, *W.L. Gore* and *Cumberland Pharm.* are  
11 all talking about the exact kind of behavior.

12 I find it almost unimaginable that in both of  
13 these patents there was no disclosure of their own devices  
14 and prior products. They have a duty of candor. They  
15 signed that under oath. And where you have an overt  
16 misrepresentation of the prior art and the problem to be  
17 solved, which is what both of these two patents had, and it  
18 is your own, and you don't disclose it, that is where courts  
19 have said, you are entitled to a reasonable inference that  
20 that was done with intent to deceive to get the patent.

21 And here, you know, they said, well where did the  
22 porosity thing come from? This is specifically alleged in  
23 the counterclaim in relationship to the Patent Office's  
24 denial of all of the references. So, we have to be careful  
25 we don't cherry-pick one part of the counterclaim, because

1 this is what they said, and we referenced exactly what they  
2 had in their possession with that '329 Patent that had the  
3 variable nozzle that could -- and also, now we've learned of  
4 the road width.

5 But, in any case, we have enough to even consider  
6 a summary judgment motion, we believe. So, I think that we  
7 can get well beyond inequitable conduct at the pleading  
8 stage, Your Honor. So --

9 THE COURT: All right?

10 MR. CASS: Thank you very much.

11 THE COURT: Thank you. I may give you the last  
12 word after rebuttal here before we are done. Lawyers rarely  
13 pass up the opportunity, but we will see.

14 MR. GRIMSRUD: Thank you, Your Honor.

15 THE COURT: I will give you a moment here to --

16 MR. CASS: I'm sorry.

17 THE COURT: I guess for lack of a better word,  
18 obviously, the line has been drawn, I guess, in the sand or  
19 down the courtroom. You heard what counsel said.

20 MR. GRIMSRUD: Yeah, I think, Your Honor, some  
21 comments in rebuttal. One, this is showing -- counsel's  
22 argument showed the importance of identifying the claims and  
23 claim limitations when you are trying to allege inequitable  
24 conduct. Much of the discussion on the -- I will start with  
25 the '058 Patent, which is on the heating that he had talked

1 about.

2 And he talked about the specification a lot where  
3 it says approximately 70 to 90 degrees it talks about. The  
4 claims are what you need to look at, not the specification.  
5 The claims, you know, are what matter in the case. And this  
6 is the type of thing that is not mentioned in their pleading  
7 is that Claim 1 of the '058 Patent says that the -- it is  
8 dispensing a material having at least a local region  
9 temperature that exceeds the solidification temperature --

10 THE COURT: Can we slow it down just a little bit?

11 MR. GRIMSRUD: Yes, sorry.

12 THE COURT: I mean, we all have a tendency when we  
13 are reading something to pick up the speed, but --

14 MR. GRIMSRUD: Yes.

15 THE COURT: -- for the benefit of my court  
16 reporter, even though, at least, we have a reference here.  
17 But, if you would please? Thank you.

18 MR. GRIMSRUD: Thank you, Your Honor, I apologize.  
19 The patent in Claim 1, for example, says that the  
20 temperature has to exceed the solidification temperature, so  
21 it has to be above it.

22 And the FDM 1650 product that he was talking  
23 about, he says went up to 70 degrees, which does not exceed  
24 the solidification temperature. You know, these potentially  
25 could be claim construction issues, but they have not

1 explained how the FDM 1650 teaches something that exceeds  
2 the solidification temperature of the thermally  
3 solidifiable material.

4           Instead, what they have done is they have looked  
5 at the specification, and they focused on statements in the  
6 specification; but, the claims specifically say that it has  
7 to exceed the temperature. And the FDM 1650 that they have  
8 been talking about says it goes up to 70 degrees, which  
9 would not exceed the solidification temperature for the ABS  
10 material.

11           THE COURT: Well, and I don't think you are  
12 implying, and perhaps neither party is; but, I will soon  
13 find out. Obviously, you said: Well, you used the phrase  
14 claim construction. Obviously, if we were here at a *Markman*  
15 hearing, then where we usually end up going is the  
16 specification.

17           So, obviously, you are suggesting, well, we don't  
18 really need to get to that, but here is what the claim says  
19 versus the specification. And I am not -- I think it is  
20 highly unlikely, and maybe neither party is suggesting that.  
21 I believe that I can make a ruling on the case without doing  
22 any claim construction. Because obviously if one of you  
23 say: Well, no you can't. Of course, then we have the  
24 Defense point of view. And you heard me say this before.  
25 And you are commenting on it now; and that is, well, same

1 inventors, same product, same prior art. It is that "so  
2 obvious" argument that it's -- I will use the phrase -- it  
3 wasn't counsel's phrase, but it jumps off the page or the  
4 pleading, it is so obvious that this was fraud; that they  
5 didn't disclose this prior art. I mean, that is really  
6 where the two of you very dramatically part company and you  
7 were just commenting on that.

8 MR. GRIMSRUD: Yes, Your Honor, we don't think  
9 claim construction is needed now. Our only point is this is  
10 an example of why it is important in your pleading to be  
11 specific with inequitable conduct and say which claim you  
12 are talking about and which claim limitation you are talking  
13 about.

14 Because in our view the FDM 1650 is not at all  
15 relevant, certainly not "but for" material, because the  
16 claim says you have to exceed the solidification  
17 temperature.

18 So, it really goes to the higher level point of in  
19 order to plead inequitable conduct, you need to be specific.  
20 You need to identify the claims, the claim limitations, and  
21 explain where those limitations are met by the prior art.

22 And, you know, counsel talked about the '058  
23 Patent, also discussing the '329 and other patents. And  
24 this is, I believe, from the specification of the '058  
25 Patent, where it actually says that the patents that were

1 disclosed to the Patent Office teach a build environment  
2 that is maintained at and below the solidification  
3 temperature.

4 So, the inventors told the Patent Office that  
5 there was other references that taught maintaining the  
6 temperature at the solidification temperature, which is what  
7 we -- but what the claims say is you exceed the  
8 solidification temperature. And they have not explained,  
9 alleged, how the FDM 1650 exceeds the solidification  
10 temperature. So, they have not explained at all in their  
11 pleading how the FDM 1650 is not just cumulative of other  
12 references that were given to the Patent Office. So, this  
13 is another example of the lack of specificity resulting in  
14 dismissal under 12(b)(6).

15 The '925 Patent is -- there are similar issues on  
16 their materiality allegations that they talk -- this is the  
17 porosity patent. And counsel talked about controlling the  
18 porosity. The claims say "predetermined porosity." It is  
19 about an invention that you are able to establish this  
20 predetermined porosity.

21 And the '329 Patent, which I don't know if I  
22 misheard counsel or not, but he was suggesting that -- I  
23 believe that counsel had this slide up or a slide showing  
24 this information and said that the inventors did talk about  
25 porosity with the Patent Office in prosecuting the '925

1 Patent.

2 What we were saying was that the '329 Patent,  
3 which was -- which is the one that they are basing their  
4 inequitable conduct charge on, that patent, the '329 Patent,  
5 doesn't mention porosity. Whereas prior art that was given  
6 to the Patent Office does mention porosity. And they have  
7 not explained how the '329 Patent could possibly be a "but  
8 for" material reference when it doesn't even mention  
9 porosity. And the references that were given to the Patent  
10 Office discuss porosity.

11 And in fact, this is another one of counsel's  
12 slides. Their argument is that the '329 Patent, while it  
13 doesn't maybe mention porosity, it is about controlling  
14 porosity. That is what they say -- or that it would allow  
15 you to control porosity; that is in Afinia's argument.

16 Well, this again, as they show in their slide  
17 here, this is a section from the prosecution history of the  
18 '925 Patent where the applicants told the Patent Office that  
19 this prior art that was given to the Patent Office simply  
20 states that porosity can be controlled.

21 So, there was no mystery that porosity can be  
22 controlled. The patents told the Patent Office that. And  
23 they have not identified how, in their pleading, how the  
24 '329 Patent discloses anything more with respect to  
25 porosity. And in fact, it doesn't even mention porosity.



1 So, it would seem actually much less relevant than CIMA  
2 references.

3 You know, the same with -- we didn't hear much  
4 about allegations for who specifically knew of the material  
5 information and factual allegations about intent to deceive,  
6 which I won't get into again, but in our view they have not  
7 alleged any facts about a certain person attempting to  
8 deceive the Patent Office.

9 Back to the Court's comments about case management  
10 at the beginning of the day? One suggestion we would  
11 propose is that one option would be, since a lot of this is  
12 now starting to delve into claim construction and things  
13 like that is if we could put a deadline after claim  
14 construction for seeking leave to amend the pleadings, so  
15 after discovery, after claims had been construed, there  
16 would be a deadline to amend the pleadings with respect to  
17 inequitable conduct. That would be one option, to try to  
18 have a structure in place with specific deadlines.

19 THE COURT: Well, and of course, I want to be  
20 sensitive to the concerns of both parties. One of the --  
21 one of the criticisms of -- and somewhat legitimate ones  
22 these days in Federal Courts, although it comes more in the  
23 context of e-discovery. But, they are saying, well,  
24 aggressive but fair case management early on in the case  
25 helps control the scope of discovery. But, you are

1 suggesting that however it comes out, that that may not be  
2 the paramount issue from your client's point of view. So  
3 that, hence, one way to do that is if that amendment date  
4 would be -- we will see what defense counsel says shortly  
5 after any *Markman* hearing and claim construction order.  
6 Then that would be -- it would be hard for the defense to  
7 argue that, one, it would be apparent what the record is,  
8 although the defense is saying it is apparent now. And two,  
9 then the record would be what it was. And then we would  
10 know once and for all, from your point of view, well, we  
11 said before and we will say it again: There is no record of  
12 inequitable conduct, and also relating to some of the  
13 affirmative defense issues.

14 MR. GRIMSRUD: Exactly, Your Honor. Everybody  
15 would know the scope of the claims. And everybody would  
16 have presumably taken the discovery they wanted to take and  
17 that would be a sensible deadline, in our view.

18 THE COURT: All right. What I will probably do,  
19 absent some agreement of the parties, just to be fair to  
20 both parties, I will rule on what's in front of me, but then  
21 I am not saying you have to retreat back once my decision is  
22 made, regardless of what it is, I am not suggesting then  
23 because it has come up today, even if a short -- once you  
24 get my decision, if one or both parties would say: Well,  
25 can we have a five minute on or off the record status

1 conference with the Judge? Because, let's nudge or let's  
2 bump the -- let's move this amendment date.

3 I'll just make sure I deal with this. Obviously,  
4 I acknowledge that with or without your agreement, that is  
5 one thing I could do. And have some attorneys done it with  
6 or without agreement, or courts in the past? Yes. It can  
7 be very fact specific to a particular case, because as you  
8 all know, one size rarely fits all. All right?

9 MR. GRIMSRUD: Okay. And Your Honor, I will close  
10 out on the patent misuse.

11 THE COURT: All right.

12 MR. GRIMSRUD: Their theory that is pleaded in  
13 their defenses is based on assertion of the patents. And  
14 that, in our view, is clearly and legally foreclosed. And  
15 they have not alleged patent misuse based on this licensing  
16 theory, which I won't get back into all of the details; but  
17 again, we believe it is just a speculative and unreasonable  
18 reading of this license agreement and doesn't have support  
19 in the case law.

20 And I wanted to also mention, Your Honor, on the  
21 case management issues, we did actually discuss -- my  
22 colleague pointed out, Mr. Liebman pointed out that we did  
23 discuss at the scheduling conference on the patent misuse  
24 issue for discovery --

25 THE COURT: All right.

1 MR. GRIMSRUD: That, you know, we reserve our  
2 right to limit discovery if we thought the discovery was  
3 going too far into patent misuse, market-type things. So,  
4 we did reserve that right to the extent we thought the  
5 discovery was excessive --

6 THE COURT: And in fairness to both parties, even  
7 if we weren't here today, that is the whole purpose of some,  
8 you know, early on and -- but even-handed case management.  
9 Obviously, if hadn't been discussed, frankly speaking, I  
10 don't think either side would be very successful in  
11 convincing a Judge that, well, since it wasn't discussed, it  
12 is waived. I mean the "W" word, waiver, is a pretty hard  
13 one to convince some -- if it is a case management issue.  
14 So, that makes -- I understand that. So, all right?

15 MR. GRIMSRUD: All right. Thank you, Your Honor.  
16 We'd ask that the counterclaims be dismissed and the  
17 affirmative defenses stricken.

18 THE COURT: Would you like the final word,  
19 Counsel?

20 MR. CASS: I would, Your Honor.

21 THE COURT: I thought you might.

22 MR. CASS: I just wanted to point out two things,  
23 because this is the pleading, itself. It wasn't -- he just  
24 mentioned it was -- they disclosed that they could control  
25 porosity. That is not what the statement was.

1           It was, neither suggests the adjustment of the  
2     rate of dispensation of material. Neither show changing the  
3     rate of dispensation as the actual statement. It wasn't  
4     controlling porosity, because that was conceded, it was  
5     adjusting the rate. And that is in our pleading.

6           And then if you flip -- we talked about that prior  
7     art. And then if you flip a few pages, we state in  
8     paragraph 51, at all times relevant to the disclosed varying  
9     the rate of dispensation, which is because, and we emphasize  
10    this for the Court, it can change the orifice tip, they can  
11    change -- they can vary the orifice. So, I just wanted to  
12    make clear that Your Honor understood that we actually pled  
13    the very distinct reason. That is why it was a  
14    misrepresentation.

15           And then also on the '058 Patent I wanted to just  
16    point out that he then -- he referenced the claim, and he  
17    referenced -- he said, oh, that doesn't talk about above.

18           The very provision that we cited in paragraph 63,  
19    this talks about the difference between solidification and  
20    creep relaxation. Creep relaxation temperature is something  
21    that only an engineer could come up with. But, it has to do  
22    with how the element is sort of like cooled in this range  
23    of, range of heating, so that there is better material  
24    properties within it, and I am oversimplifying it.

25           But what is important here is they say in the

1 patent that the solidification and its creep relaxation  
2 temperature, you know, they say maintain it at a temperature  
3 that is preferably in a range between the solidification  
4 temperature and its creep relaxation temperature, and then  
5 they give the actual example.

6 "Preferably, it should be maintained closer to the  
7 creep relaxation temperature. In the case of *ABS Plastics*,  
8 temperature window falls between 70 and 90." So, it is  
9 right in the pleadings and it is exactly what they said and  
10 it was exact misrepresentation, because they had already  
11 been maintaining it at 70 degrees Celsius.

12 I just wanted to point that out because when a  
13 counterclaim gets cherry-picked paragraph by paragraph,  
14 sometimes you lose track of what was actually alleged, and  
15 we alleged specifically what it was that they said, which  
16 was an overt representation, and that goes back to the three  
17 cases. I won't bore you by mentioning those cases again,  
18 Your Honor. So --

19 THE COURT: Thank you. I didn't see you leaping  
20 out of your chair, Mr. Grimsrud, but is there anything else  
21 you would like to --

22 MR. GRIMSRUD: Nothing further, Your Honor.

23 THE COURT: I will turn on -- back off the mood  
24 lighting here, so to speak.

25 I will thank you each for your arguments. I will

1        deem it submitted. I will have a memorandum and opinion out  
2        to you in no more than 60 days, and hopefully it will be  
3        less. I am assuming unless that creates -- depending on  
4        what you have scheduled with the management order in place,  
5        that if there is -- if one or both of you are now thinking:  
6        Well, the Judge doesn't know it, but here is what is going  
7        to become an issue right away, then I suppose I should know  
8        that now.

9                MR. CASS: The only thing I would mention, Your  
10       Honor, Afinia is a very small company, and we are in the  
11       process of trying to do electronic discovery. We think to  
12       do it right, is to do it once, because they are so small.  
13       And that is just one issue. And, you know, it would be  
14       helpful for us, I think, to get all of these issues  
15       resolved.

16               We have engaged an expert. I think we would be  
17       ready, I think, to file some summary judgment motions on  
18       some of this stuff fairly quickly. So, my preference is to  
19       try to do -- you know, the poison in these cases is often  
20       just the discovery expense.

21               THE COURT: That is true. Well, do you think  
22       there is a -- I will ask Plaintiff's counsel, too. Do you  
23       think that given the time frame now that there's -- you  
24       could probably agree on something that seems fair to both  
25       parties? Or are you saying: No, we can see right now we

1 are headed into a disagreement on that until we get your  
2 decision? What's --

3 MR. LIEBMAN: Your Honor, the state we are at  
4 right now is that there is a wave of written discovery and  
5 interrogatories out and neither party has responded. The  
6 first discussion on electronic discovery I think will be  
7 next time. So, right now we are at the beginning of the  
8 discovery phase.

9 What makes sense in this case, as I think in most  
10 other cases, is we do the claim construction for all four  
11 patents. Moving ahead on two of the patents makes no sense.  
12 We still have the other two patents.

13 So, we ought to do this discovery, take up the  
14 discovery disputes with the Magistrate, and they will get  
15 all of the inequitable conduct discovery they want  
16 irrespective of the ruling, and do the claim construction.  
17 And then if they want to keep this in the case, they can  
18 seek leave to amend if it's Your Honor's position.

19 I don't think any special procedures are called  
20 for here. This is no different than anything else. And one  
21 comment about their being a small company? We are hoping  
22 that they are not trying to do asymmetric discovery, saying  
23 they don't -- that Stratasys has to spend millions of  
24 dollars responding on discovery, meanwhile they will try to  
25 use the small company status as a shield. We think that the



1 parties should try to get together and try to limit  
2 discovery to the issues. And inequitable conduct, we are  
3 going to give them the discovery they want. There is no  
4 issue here.

5 THE COURT: Well, why don't we do this? Why don't  
6 you, if you get to the point in the -- whether it is in the  
7 next few days or next couple of weeks where you say: Well,  
8 we now think, with or without the Judge or Magistrate  
9 Judge's involvement, this isn't what was contemplated. And  
10 here is how the discovery would be affected by getting the  
11 Judge's decision earlier, rather than later. We don't want  
12 to be duplicitous or something else. Then I assume with the  
13 permission or notice of the other party, we will pick up the  
14 phone, and I will make sure the Magistrate Judge knows:  
15 Well, they are going to meet and confer. And I predict this  
16 will get resolved in such a way that -- because the irony  
17 is, usually it is coming from the other side on a motion  
18 like this, saying: Well, here is the discovery we shouldn't  
19 have to give unless we lose on this motion, whether  
20 inequitable conduct -- but, if there is some concern about  
21 that, I assume somebody will pick up the phone. And one of  
22 us, without dragging everybody back to court, one of us will  
23 take care of it. But, I will let Magistrate Judge Graham  
24 know, too, that we may or may not get that call.

25 MR. LIEBMAN: Right. Let me just clarify what I

1       said.

2               THE COURT: All right.

3               MR. LIEBMAN: I don't think we are going to have  
4 any discovery disputes regarding inequitable conduct. We'll  
5 give them all of that discovery.

6               On the other hand, the misuse defense, to the  
7 extent it asserts market type issues and they seek broad  
8 discovery, that is where I can see there being discovery  
9 disputes.

10              THE COURT: All right. Why don't you see, if that  
11 is the case, we will -- because sometimes I think it's --  
12 well, I don't think, I know it is unfair to parties whether  
13 it is this context or something else to say: Don't bother  
14 us, work it out. That is why we are here. If you can't  
15 work something out, then that is our responsibility to give  
16 you immediate access to us and make a decision.

17              So, if there becomes an issue there on scope,  
18 whether it is the misuse issue or another one, you will have  
19 access to one or both of us, and there won't be some fancy  
20 or delayed motion practice. We will make the call on it.

21              MR. CASS: I don't anticipate going on a fishing  
22 expedition. It is an unusual situation. I think Your Honor  
23 has seen me -- we've actually referenced the industrial  
24 support we have of very solid evidence of their market  
25 power. And usually that is what those fishing expeditions

1 are out trying to get. So, I think there is some concern, I  
2 think, on my client that they have contacted all but the  
3 Plaintiff on that. You know, we will get that in the normal  
4 course of the --

5 THE COURT: Well, so, if there is an issue,  
6 whether it is that or something else, give us a ring and one  
7 of us will give you immediate access to us.

8 MR. LIEBMAN: Thank you, Your Honor.

9 MR. CASS: Thank you, Your Honor.

10 THE COURT: Thank you all. Have a nice weekend.  
11 We are adjourned.

12 And for the folks here for the Franklin matter, as  
13 long as it takes to have counsel pack up and go and you come  
14 up to counsel table, we'll move right into it shortly. So,  
15 we will stand in recess for the next couple of minutes.  
16 Thank you.

17 (Adjournment.)

18  
19 \* \* \*

20 I, Jeanne M. Anderson, certify that the foregoing  
21 is a correct transcript from the record of proceedings in  
22 the above-entitled matter.

23  
24 Certified by: s/ Jeanne M. Anderson  
25 Jeanne M. Anderson, RMR-RPR  
Official Court Reporter